

SUPREME COURT OF THE UNITED STATES

No. 9.—OCTOBER TERM, 1966.

United States, Appellant,	} On Appeal From the United	
v.		States District Court for
Sealy, Inc.		the Northern District of Illinois.

[June 12, 1967.]

MR. JUSTICE FORTAS delivered the opinion of the Court.

Respondent and its predecessors have, for more than 40 years, been engaged in the business of licensing manufacturers of mattresses and bedding products to make and sell such products under the Sealy name and trademarks. In this civil action the United States charged that respondent had violated § 1 of the Sherman Act by conspiring with its licensees to fix the prices at which the retail customers of the licensees might resell bedding products bearing the Sealy name, and to allocate mutually exclusive territories among such manufacturer-licensees.

After trial, the District Court found that the defendant was engaged in a continuing conspiracy with its manufacturer-licensees to agree upon and fix minimum retail prices on Sealy products and to police the prices so fixed. It enjoined the defendant from such conduct, "Provided, however, that nothing herein contained shall be construed to prohibit the defendant from disseminating and using suggested retail prices for the purpose of national advertising of Sealy products." Appellee did not appeal the finding or order relating to price-fixing.

With respect to the charge that appellee conspired to allocate mutually exclusive territory among its manufacturers, the District Court held that the United States had not proved conduct "in unreasonable restraint of

trade in violation of Section 1 of the Sherman Act." The United States appealed under § 2 of the Expediting Act. 15 U. S. C. § 29. We noted probable jurisdiction. 382 U. S. 806 (1965).

There is no dispute that exclusive territories were allotted to the manufacturer-licensees. Sealy agreed with each licensee not to license any other person to manufacture or sell in the designated area; and the licensee agreed not to manufacture or sell "Sealy products" outside the designated area. A manufacturer could make and sell his private label products anywhere he might choose.

Because this Court has distinguished between horizontal and vertical territorial limitations for purposes of the impact of the Sherman Act, it is first necessary to determine whether the territorial arrangements here are to be treated as the creature of the licensor, Sealy, or as the product of a horizontal arrangement among the licensees. *White Motor Co. v. United States*, 372 U. S. 253 (1963).

If we look at substance rather than form, there is little room for debate. These must be classified as horizontal restraints. Compare *United States v. General Motors*, 384 U. S. 127, 141-148 (1966); *id.*; at 148-149 (HARLAN, J., concurring); *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960).

There are about 30 Sealy "licensees." They own substantially all of its stock.¹ Sealy's bylaws provide that each director must be a stockholder or a stockholder-licensee's nominee. Sealy's business is managed and controlled by its board of directors. Between board meetings, the executive committee acts. It is composed of Sealy's president and five board members, all licensee-

¹ A nonlicensee, Bergmann, who was Sealy's president in the 1960's, owns some of the remaining stock; stockholders have preemptive rights.

stockholders. Control not only resides in the licensees as a matter of form. It is exercised by them in the day-to-day business of the company including the grant, assignment, reassignment, and termination of exclusive-territorial licensees. Action of this sort is taken either by the board of directors or the executive committee of Sealy, both of which, as we have said, are manned, wholly or almost entirely, by licensee-stockholders.

Appellee argues that "there is no evidence that Sealy is a mere creature or instrumentality of its stockholders." In support of this proposition, it stoutly asserts that "the stockholders and directors wore a 'Sealy hat' when they were acting on behalf of Sealy." But the obvious and inescapable facts are that Sealy was a joint venture, of, by, and for its stockholder-licensees; and the stockholder-licensees are themselves directly, without even the semblance of insulation, in charge of Sealy's operations.

For example, some of the crucial findings of the District Court describe actions as having been taken by "stockholder representatives" acting as the board or a committee.

It is true that each licensee had an interest in Sealy's effectiveness and efficiency, and as stockholders, they welcomed its profitability—at any rate within the limits set by their willingness as licensees to pay royalties to the joint venture. But that does not determine whether they as licensees are chargeable with action in the name of Sealy. We seek the central substance of the situation, not its periphery;² and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats. The arrangements for

² Cf., e. g., *Timken Roller Bearing v. United States*, 341 U. S. 593 (1951); *United States v. General Motors*, 384 U. S. 127 (1966); *United States v. New Wrinkle, Inc.*, 342 U. S. 371 (1952); *United States v. American Tobacco Co.*, 221 U. S. 106 (1911).

exclusive territories are necessarily chargeable to the licensees of appellee whose interests such arrangements were supposed to promote and who, through select members, guaranteed or withheld, and had the power to terminate, licenses for inadequate performance. The territorial arrangements must be regarded as the creature of horizontal action by the licensees. It would violate reality to treat them as equivalent to territorial limitations imposed by a manufacturer upon independent dealers as incident to the sale of a trade-marked product. Sealy, Inc., is an instrumentality of the licenses for purposes of the horizontal territorial allocation. It is not the principal.

Accordingly, this case is to be distinguished from *White Motor Co. v. United States*, *supra*, which involved a vertical territorial limitation. In that case, this Court pointed out that vertical restraints were not embraced within the condemnation of horizontal territorial limitations in *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 (1951), and, prior to trial on summary judgment proceedings, the Court declined to extend *Timken* "to a vertical arrangement by one manufacturer restricting the territory of his distributors or dealers." 372 U. S., at 261.

Timken involved agreements between United States, British, and French companies for territorial division among themselves of world markets for antifriction bearings. The agreements included fixing prices on the products of one company sold in the territory of the others; restricting imports to and exports from the United States; and excluding outside competition. This Court held that the "aggregation of trade restraints such as those existing in this case are illegal under the [Sherman] Act." 341 U. S., at 598.

In the present case, we are also faced with an "aggregation of trade restraints." Since the early days of the

company in 1925 and continuously thereafter, the prices to be charged by retailers to whom the licensee-stockholders of Sealy sold their products have been fixed and policed by the licensee-stockholders directly, by Sealy itself, and by collaboration between them. As the District Court found:

"the stockholder-licensee representatives . . . as the board of directors, the Executive Committee, or other committees of Sealy, Inc. . . . discuss, agree upon and set

"(a) The retail prices at which Sealy products could be sold;

"(b) The retail prices at which Sealy products could be advertised;

"(c) The comparative retail prices at which the stockholder-licensees and the Sealy retailers could advertise Sealy products;

"(d) The minimum retail prices below which Sealy products could not be advertised;

"(e) The minimum retail prices below which Sealy products could not be sold; and

"(f) The means of inducing and enforcing retailers to adhere to these agreed upon and set prices."

These activities, as the District Court held, constitute a violation of the Sherman Act. Their anticompetitive nature and effect are so apparent and so serious that the courts will not pause to assess them in light of the rule of reason. See, e. g., *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 210-218 (1940); *United States v. General Motors*, 384 U. S. 127, 147 (1966).

Appellee has not appealed the order of the District Court enjoining continuation of this price-fixing, but the existence and impact of the practice cannot be ignored in our appraisal of the territorial limitations. In the first place, this flagrant and pervasive price-fixing,

in obvious violation of the law, was, as the trial court found, the activity of the "stockholder representatives" acting through and in collaboration with Sealy mechanisms. This underlines the horizontal nature of the enterprise, and the use of Sealy, not as a separate entity, but as an instrumentality of the individual manufacturers. In the second place, this unlawful resale price-fixing activity refutes appellee's claim that the territorial restraints were mere incidents of a lawful program of trademark licensing. Cf. *Timken Roller Bearing Co. v. United States, supra*.³ The territorial restraints were a part of the unlawful price-fixing and policing. As specific findings of the District Court show, they gave to each licensee an enclave in which he could and did zealously and effectively maintain resale prices, free from the danger of outside incursions. It may be true, as appellee vigorously argues, that territorial exclusivity served many other purposes. But its connection with the unlawful price-fixing is enough to require that it be

³ In *Timken*, as in the present case, it was argued that the restraints were reasonable steps incident to a valid trademark licensing system. But the Court summarily rejected the argument, as we do here. It pointed out that the restraints went far beyond the protection of the trademark and included nontrademarked items, and it concluded that: "A trademark cannot be legally used as a device for Sherman Act violation." 341 U. S., at 599. Cf. the Lanham Act, 15 U. S. C. § 1115 (b)(7). In *Timken*, the restraints covered nonbranded merchandise as well as the "Timken" line. In the present case the restraints were in terms of "Sealy products" only. As to their private label products, the licensees were free to sell outside of the given territory and, so far as appears, without resale price collaboration or enforcement. But this difference in fact is not consequential in this case. A restraint such as is here involved of the resale-price of a trademarked article, not otherwise permitted by law, cannot be defended as ancillary to a trademark licensing scheme. Cf. also *United States v. General Motors*, 384 U. S. 127, 142-143 (1966).

condemned as an unlawful restraint and that appellee be effectively prevented from its continued or further use.

It is urged upon us that we should condone this territorial limitation among manufacturers of Sealy products because of the absence of any showing that it is unreasonable. It is argued, for example, that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to the use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition, and should not be condemned as *per se* unlawful. But condemnation of appellee's territorial arrangements certainly does not require us to go so far as to condemn that quite different situation, whatever might be the result if it were presented to us for decision.⁴ For here, the arrangements for territorial limitations are part of "an aggregation of trade restraints" including unlawful price-fixing and policing. *Timken Roller Bearing Co. v. United States*, *supra*, 341 U. S., at 598. Compare *United States v. General Motors*, 384 U. S. 127, 147-148 (1966).⁵ Within settled doctrine, they are unlawful under § 1 of the Sherman Act without the necessity for an inquiry

⁴ Cf. *Northern Pacific R. Co. v. United States*, 356 U. S. 1, 6-7 (1957): "As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

⁵ MR. JUSTICE HARLAN observed, concurring in *United States v. General Motors*, 384 U. S. 127, 148-149, that "Although *Parke Davis* related to alleged price-fixing, I have been unable to discern any tenable reason for differentiating it from a case involving, as here, alleged boycotting." The same conclusion would seem to apply with respect to an alleged market division, which, like price-fixing, group boycotts, and tying arrangements, has been held to be a *per se* violation of the Sherman Act. *Northern Pac. R. Co. v. United States*, 356 U. S. 1, 5 (1958).

in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness.

Accordingly, the judgment of the District Court is reversed and the case remanded for the entry of an appropriate decree.

MR. JUSTICE CLARK and MR. JUSTICE WHITE took no part in the decision of this case.

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MR. JUSTICE HARLAN, dissenting.

I cannot agree that on this record the restrictive territorial arrangements here challenged are properly to be classified as "horizontal," and hence illegal *per se* under established antitrust doctrine. I believe that they should be regarded as "vertical" and thus, as the Court recognizes, subject to different antitrust evaluation.

Sealy, Inc., is the owner of trademarks for Sealy branded bedding. Sealy licenses manufacturers in various parts of the country to produce and sell its products. In addition, Sealy provides technical and managerial services to them, conducts advertising and other promotional programs, and engages in technical research and quality control activities. The Government's theory of this case in the District Court was essentially that the allocation of territories by Sealy to its various licensees was unlawful *per se* because in spite of these other legitimate activities Sealy was actually a "front" created and used by the various manufacturers of Sealy products "to camouflage their own collusive activities . . ." Plaintiff's Brief in Opposition to Defendants' Briefs, October 12, 1961, pp. 12, 15.

If such a characterization of Sealy had been proved at trial I would agree that the division of territories is illegal *per se*. Horizontal agreements among manufacturers to divide territories have long been held to violate the anti-

trust laws without regard to any asserted justification for them. See *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *United States v. National Lead Co.*, 332 U. S. 319; *Timken Roller Bearing Co. v. United States*, 341 U. S. 593. The reason is that territorial divisions prevent open competition, and where they are effected horizontally by manufacturers or by sellers who in the normal course of things would be competing among themselves, such restraints are immediately suspect. As the Court noted in *White Motors Co. v. United States*, 372 U. S., 253, 263, they are "naked restraints of trade with no purpose except stifling of competition." On the other hand, vertical restraints—that is, limitations imposed by a manufacturer on his own dealers, as in *White Motors, supra*, or by a licensor on his licensees—may have independent and valid business justifications. The person imposing the restraint cannot necessarily be said to be acting for anticompetitive purposes. Quite to the contrary, he can be expected to be acting to enhance the competitive position of his product *vis-à-vis* other brands.

With respect to vertical restrictions, it has long been recognized that in order to engage in effective *interbrand* competition, some limitations on *intra-brand* competition may be necessary. Restraints of this type "may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business (cf. *Brown Shoe [v. United States]*, 370 U. S. 294], at 330; *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 560-561, *aff'd*, 365 U. S. 567) and within the 'rule of reason,' " *White Motors, supra*, at 263; see also *id.*, at 267-272 (concurring opinion of BRENNAN, J.). For these reasons territorial limitations imposed vertically should be tested by the rule of reason, namely, whether in the context of the particular industry, "the restraint imposed is such as merely regulates and perhaps thereby promotes competition or

whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U. S. 231, 238. Indeed the Court reaffirms these principles in the opinion which it announces today in *United States v. Arnold, Schwinn & Co., post*.

The question in this case is whether Sealy is properly to be regarded as an independent licensor which, as a prima facie matter, can be deemed to have imposed these restraints on its licensees for its own business purposes, or as equivalent to a horizontal combination of licensees, that is as simply a vehicle for effectuating horizontal arrangements between its licensees. On the basis of the findings made by the District Court, I am unable to accept the Court's classification of these restraints as horizontally contrived. The District Court made the following findings:

"84. The preceding [detailed factual] findings indicate the type of evidence in this record that demonstrates that there has never been a central conspiratorial purpose on the part of Sealy and its licensees to divide the United States into territories in which competitors would not compete. Their main purpose has been the proper exploitation of the Sealy name and trademarks by licensing bedding manufacturers to manufacture and sell Sealy products in exchange for royalties to Sealy. The fact remains that each licensee was restricted in the territory in which he could manufacture and sell Sealy products. However, the record shows that this restriction was imposed by Sealy and was also secondary, or ancillary, to the main purpose of Sealy's license contracts.

"119. Plaintiff's evidence, read as a whole, conclusively proves that the Sealy licensing arrangements were developed in the early 1920's for entirely

legitimate business purposes, including royalty income to Sugar Land Industries, which owned the Sealy name, trademarks, and patents, and the benefits to licensees of joint purchasing, research, engineering, advertising and merchandising. These objectives were carried out by successor companies, including defendant, whose activities have been directed not toward market division among licensees but toward obtaining additional licensees and more intensive sales coverage."

The Solicitor General in presenting the appeal to this Court stated explicitly that he did *not* contend "that Sealy, Inc. was no more than a facade for a conspiracy to suppress lawful competition," Brief, p. 12, since it admittedly did have genuine and lawful purposes. For me these District Court findings, which the Government accepts for purposes of this appeal, take this case out of the category of horizontal agreements, and thus out of the *per se* category as well.¹ Sealy has wholly legitimate interests and purposes of its own: it is engaged in vigorous interbrand competition with large integrated bedding manufacturers and with retail chains selling their own products.² Sealy's goal is to maximize sales of its products nationwide, and thus to maximize its royalties. The test under such circumstances should be the same as that

¹ Compare *United States v. General Motors*, 384 U. S. 127, where the undisputed facts as found by the District Court, *id.*, at 140-141, proved a horizontal conspiracy among Chevrolet dealers to initiate and police a boycott of sales by dealers to discount houses. It is precisely because no such horizontal impetus was shown to exist here that I view this case differently. See my concurring opinion in *General Motors*, 384 U. S., at 148.

² The District Court made no findings as to the position of Sealy in the bedding industry, but on the basis of testimony introduced and not seriously contravened it appears that Sealy products are, by no means the largest selling bedding products, that Sealy manufacturers have many competitors both nationwide and local, and that advertising—particularly nationwide advertising—is an important competitive factor in the industry.

governing other vertical relationships, namely, whether in the context of the market structure of this industry, these territorial restraints are reasonable business practices, given the true purposes of the antitrust laws. See *White Motors, supra*; *Sandura Co. v. FTC*, 339 F. 2d 847. It is true that in this case the shareholders of Sealy are the licensees. Such a relationship no doubt requires special scrutiny.³ But I cannot agree that this fact by itself *automatically* requires striking down Sealy's policy of territorialization. The correct approach, in my view, is to consider Sealy's corporate structure and decision-making process as one (but only one) relevant factor in determining whether the restraint is an unreasonable one. Compare *United States v. Penn-Olin Chem. Co.*, 378 U. S. 158, 170.

The Court in reaching its result relies heavily on the fact that these territorial limitations were part of "an 'aggregation of trade restraints,'" *ante*, p. 4, because the District Court has held that appellee did violate the Sherman Act by engaging in unlawful price fixing. "The territorial restraints," the Court says, "were a part of the unlawful price-fixing and policing," *ante*, p. 6. Nothing, however, in the findings of the District Court supports this conclusion. Indeed, the opposite conclusion is

³ The Sealy trademark was originally owned by Sugar Land Industries, and its products were manufactured by a subsidiary, Sealy Mattress Co. In the 1920's independent manufacturers were licensed to produce Sealy products, and in 1925 Sugar Land sold the trademarks to a new corporation, Sealy Corp., owned by one E. E. Edwards and the various Sealy licensees. In 1933, when the economic depression eliminated a number of Sealy producers, the corporation was reorganized into the present Sealy, Inc. At present there are about 30 licensees owning approximately 90% of the stock. This joint-venture approach was created and maintained, the District Court found, "for entirely legitimate business purposes," such as obtaining the benefits "of joint purchasing, research, engineering, advertising and merchandising." Finding 119.

the more tenable one since the District Court that found Sealy guilty of price fixing found at the same time that it had not unlawfully conspired to allocate territories. The Government has not contended here that it is entitled to an injunction against territorial restrictions as a part of its relief in the price-fixing aspect of the case. The price-fixing issue was not appealed to this Court, and we can assume that the Government will obtain adequate and effective injunctive relief from the District Court. For these reasons the Court's "aggregation of trade restraints" theory seems to me ill-conceived.

I find nothing in the Court's opinion that persuades me to abandon the traditional "rule of reason" approach to this type of business practice in the context of the facts found by the trial court. The District Court, however, made no findings in respect to this theory for judging liability since the Government insisted on trying the case in *per se* terms, attempting to prove only a horizontal conspiracy. Although Sealy did introduce some evidence concerning the bedding industry, the territorialization issue was not tried in the terms of the reasonableness of the territorial restrictions. A motion to suppress Sealy's subpoena seeking discovery with respect to one of its leading competitors was successfully supported by the Government,⁴ and no evidence directly aimed at

⁴ See *United States v. Serta Associates, Inc.*, 29 F. R. D. 136, where in a companion action against another licensor of bedding products a similar subpoena was quashed after it was opposed by the Government. The District Court there noted: "The complaint alleges price fixing and market allocations by Serta, which it has denied. Defendant alleges the agreements made were reasonable ancillary restraints, valid under the Sherman Act, and the evidence sought by this subpoena would completely corroborate the reasonableness. The plaintiff, the Government, has also filed a brief supportive of the motion to quash the subpoena. It asserts that the complaint raises *per se* violations of the Sherman Act which fact renders completely irrelevant the subpoenaed material, tending to confirm the reasonableness of defendant's conduct."

justifying territorial limitations as a reasonable method of competition in the bedding industry was taken. Accordingly, the District Court made no findings as to such justification.

Although in the normal course of things I would have voted to remand the case for further proceedings and findings under the correct rules of law, I believe that since the Government deliberately chose to stand on its *per se* approach, and did not prevail, it should not be able to relitigate the case on an alternative theory, especially when it opposed appellee's efforts to present the case that way.

I would affirm the dismissal of this aspect of the case by the District Court.

A copy of this letter was sent to E. H. Bergman at Sealy, Inc. (GX 857; Tr. 1902-1903; Doc. 3-4130, 3-4131).

246. E. H. Bergmann for Sealy, Inc. in June 1955 wrote the Rochester licensee-member concerning an advertisement run by one of his retailers which Bergmann had received and which had violated every rule in the rule book of Sealy, Inc. Bergmann further informed the Rochester licensee-member that if he ever again permitted such a flagrant violation of Sealy, Inc.'s rules and regulations as had been permitted in that ad, his contract with Sealy, Inc. would be cancelled or he would be put on probation (GX 858; Tr. 1903-1905; Doc. 3-4165, 3-4166).

247. In July 1955, a retailer of the Chester licensee-member sent the Chester licensee-member an ad which another Sealy retailer in the area had run which featured Sealy products in combination with other items at a price below the agreed upon and set retail price for Sealy products [fol. 257] and informed the Chester licensee-member that Chester could not continue to carry Sealy products if he allowed that kind of advertising. The Chester licensee-member thereupon sent the ad to Sealy, Inc. and asked Sealy, Inc. whether the ad came within its "code" so the Chester licensee-member would know how to proceed. E. H. Bergmann for Sealy, Inc. replied that the dealer running the ad should be told emphatically that Sealy, Inc. did not approve of any Sealy resale item being combined with other items at a cut price and that such an indication of non-approval should be all that was necessary to keep the Chester licensee-member's retailers in line (GX 859-861; Tr. 1906-1911; Doc. 3-4151 to 3-4153).

248. In July 1955, the Schenectady and Brooklyn licensee-members exchanged correspondence about a retailer in New York City which advertised Sealy products below the agreed upon and set retail prices for Sealy products. Thereafter, the Schenectady licensee-member purchased a Sealy product from the retailer and found that it had been shipped by another retail customer of the Brooklyn licensee-member. In October 1955, the Schenectady licensee-member informed the Brooklyn licensee-member of his actions and the resultant findings and further that the offensive retailer's operation was very vicious in advertising and selling Sealy products at cut prices and since that re-

tailer had a large mailing list in the Schenectady licensee-[fol. 258] member's territory, he was causing a lot of trouble for the Schenectady licensee-member and his customers. The Brooklyn licensee-member replied that he had contacted his retail customer who had shipped the Sealy products to the offending retailer and he had admitted so supplying the offensive retailer and had guaranteed to no longer supply the offending retailer with any Sealy merchandise whatsoever. The Brooklyn licensee-member further stated that he had advised his retailer that he would continually police the offending retailer and if he found that he was selling Sealy products to the offending retailer the Brooklyn licensee-member would discontinue supplying him with Sealy products, and that the Brooklyn licensee-member would do everything in his power to stop the supply of Sealy merchandise to the offending retailer. The Brooklyn licensee-member forwarded a copy of this letter to Sealy, Inc. and the Waterbury and Patterson licensee-members. Subsequently, Sealy, Inc. by E. H. Bergmann on October 14, 1955 wrote the Brooklyn licensee-member with copies to the Schenectady and Waterbury licensee-members stating that since Sealy, Inc. had not received an answer from the Brooklyn licensee-member to its letter about the offending retailer, Sealy, Inc. assumed that the Brooklyn licensee-member had taken care of the situation in a manner satisfactory to the Brooklyn licensee-member's eastern associates (GX 865-867; Tr. 1917-1921; Doc. 3-4148, 3-4149).

[fol. 259] 249. In February 1956, E. H. Bergmann for Sealy, Inc. wrote the Richmond licensee-member concerning a retailer of the Richmond licensee-member who continually ran advertisements which were contrary to Sealy, Inc.'s retail advertising, merchandising, and price structure policies by featuring Sealy products below the agreed upon and set retail prices. Bergmann stated that Sealy, Inc. was not going to tolerate a customer taking carte blanche liberty with Sealy, Inc.'s policies and instructed the Richmond licensee-member to tell the retailer once and for all what Sealy, Inc.'s rules were and that the retailer must abide by them. Subsequently, the Richmond licensee-member telephoned the retailer and read to him portions of Bergmann's letter to the Richmond licensee-member. The same

day the Richmond licensee-member wrote the retailer requesting him to eliminate the objectionable features in his advertising as outlined by the Richmond licensee-member to the retailer and as outlined by Sealy, Inc. to the Richmond licensee-member, and informing him of the main objections to his advertisements and that it was mandatory that he adhere to Sealy, Inc.'s rules. The Richmond licensee-member further informed the retailer that Sealy, Inc. would insist that the Richmond licensee-member cease selling Sealy merchandise to him unless he eliminated the objectionable features from his advertising. The Richmond licensee-member then wrote Mr. Bergmann at Sealy, Inc. [fol. 260] informing him that he had impressed upon the retailer that if the retailer continued his policies as outlined by Sealy, Inc., Sealy, Inc. would not allow any more Sealy merchandise to be sold to him (GX 868-870; Tr. 1921-1923, 1926-1929; Doc. 3-4210 to 3-4214).

250. In February 1956, E. H. Bergmann for Sealy, Inc. wrote the Cleveland stockholder-licensee about an advertisement run by one of his retailers which was inconsistent with Sealy, Inc.'s advertising policies and suggested that the Cleveland stockholder-licensee speak to the retailer and get his assurance that he would refrain from such advertising in the future (GX 871; Tr. 1929-1930; Doc. 3-4182).

251. In March 1956, through E. H. Bergmann, Sealy, Inc. wrote to the Richmond licensee-member after his advertisements were submitted to Sealy, Inc. for credit on the advertising rebate program, that advertisements run by one of the Richmond licensee-member's retailers did not coincide with the Sealy, Inc. rules and regulations on retail advertising by featuring trade-in allowances on Sealy products, and instructed the Richmond licensee-member to advise the retailer that he could not use the trade-in feature in ads pertaining to Sealy merchandise (GX 872; Tr. 1931-1932; Doc. 3-4209).

252. In April 1956, the Cleveland stockholder-licensee informed one of his retailers that an ad run by the retailer [fol. 261] violated Sealy's retail advertising rules, that the Cleveland stockholder-licensee would not pay one cent towards the cooperative advertising agreement if any ad was run which violated the Sealy rules, and that such erroneous advertising would nullify any advertising agree-

ment which they may have had previously established. The Kansas City stockholder-licensee, having received complaints from several of its largest customers about this advertisement by the Cleveland stockholder-licensee's retailer, wrote Mr. Bergmann at Sealy, Inc. that because the Kansas City stockholder-licensee rigorously fights to police its retailers' ads so that they conform to Sealy, Inc.'s established retail advertising policies, the Kansas City stockholder-licensee had received numerous complaints from its customers about this ad by one of the Cleveland stockholder-licensee's retailers that obviously Sealy policy was not the same all over the United States, and further requested a statement from Sealy, Inc. which the Kansas City stockholder-licensee could pass on to its dealers (GX 874-875; Tr. 1934-1937; Doc. 3-4181, 3-4200, 3-4201).

253. In May 1956, a retailer of the Lexington licensee-member complained to the Lexington licensee-member about a retail outlet offering Sealy products below the set retail prices. The Lexington licensee-member's sales representative inquired at the retail outlet about the availability of mattresses and was told that they offered only Sealy mattresses and the price of the Posturepedic foam rubber [fol. 262] mattress was below the established retail price f.o.b. Washington, D. C. The Lexington licensee-member thereupon wrote Mr. Bergmann at Sealy, Inc. that it was quite obvious that the retail outlet was having this merchandise transferred to them from Washington, D. C., and requested Sealy, Inc. to take whatever action was necessary. Sealy, Inc. thereupon sent the Baltimore licensee-member a photocopy of the Lexington licensee member's letter, and requested the Baltimore licensee-member to inform the Lexington licensee-member of the steps the Baltimore licensee-member had taken to eliminate the situation. Sealy, Inc. also informed the Lexington licensee-member that the District of Columbia was a haven for price cutters, had no fair trade laws, and that the Baltimore licensee-member had been doing a masterful job in controlling the price cutters (GX 877-878, Tr. 1939-1942; Doc. 3-4202, 3-4203).

254. In June 1956, Sealy, Inc. wrote the Cleveland stockholder-licensee concerning an advertisement by one of his retailers that violated Sealy Policy Bulletin No. 7, govern-

ing restrictions on promotional advertising, and requested the Cleveland stockholder-licensee to bear down on the retailer for advertising Sealy products in violation of the Sealy retail advertising policies (GX 879; Tr. 1943-1944; Doc. 3-4176, 3-4177).

255. In June 1956, one of the Memphis licensee-member's retailers complained to the Memphis licensee-member about [fol. 263] the U. S. Merchandise Mart, Inc. in Fort Walton Beach, Florida, selling Sealy products at cost plus ten per cent out of Washington, D. C., and informed the Memphis licensee-member that the U. S. Merchandise Mart was an Army discount house. The retailer further informed Memphis that he had tried to be fair with the Sealy products and had not changed the retail price at which Memphis had told him to sell. Memphis thereupon forwarded a copy of the retailer's letter to Mr. Bergmann at Sealy, Inc. and asked Bergmann if he had heard from the Baltimore licensee-member concerning a previous similar situation as the Memphis licensee-member would like to bring the matter to a definite conclusion (GX 880; Tr. 1944-1947). In July 1956, Mr. Rudick, the Baltimore stockholder-licensee, ceased supplying the U. S. Merchandise Mart with Sealy products until it gave Baltimore written assurance that it would refrain from shipping Sealy merchandise out of the greater metropolitan Washington, D. C. area (GX 1168-1172; Tr. 3485-3492).

256. In July 1956, the Chester licensee-member sent Mr. Bergmann at Sealy, Inc. a clipping which advertised a Sealy product in violation of Sealy, Inc.'s retail advertising policy. The ad had been run by a retailer of the Cleveland licensee-member. The Chester licensee-member further informed Sealy, Inc. that "Ernie" (the Cleveland licensee-member) should at least police his own area. E. H. [fol. 264] Bergmann for Sealy, Inc. replied that this problem had been under review twice with the Cleveland stockholder-licensee, and an issue would be made of the matter if there were any recurrences. Bergmann further pointed out that Sealy, Inc. had a clipping service and was watching for further violations, and Ernie (the Cleveland licensee-member) had promised to see that such violations were discontinued. Subsequently, in October 1956, the Chester

licensee-member again sent Bergmann at Sealy, Inc. an ad run by a retailer of the Cleveland licensee-member which also violated Sealy, Inc.'s retail advertising policies. Bergmann thereupon wrote to the Cleveland stockholder-licensee about this further violation of Sealy, Inc.'s rules and stated that ". . . in this particular type of an organization *where the rules are set by those who wish to be governed by said rules* you have to be either fish or fowl and, . . . certainly the chairman of the advertising and merchandising committee . . . should be the one to lead in the strict adherence to these rules" (emphasis supplied). Bergmann further expressed the hope that he would not have to continue writing to Cleveland on these matters of policy infractions (GX 881-882, 891-892; Tr. 1947-1950, 1961-1964; Doc. 3-4171 to 3-4175).

257. In August 1955, E. H. Bergmann at Sealy, Inc., after ads were submitted by the Denver stockholder-licensee for credit on the advertising rebate program, discovered that an ad by one of the Denver stockholder-licensee's retailers [fol. 265] showed Sealy products below the agreed upon and set retail price. Bergmann wrote the Denver stockholder-licensee concerning the violations and instructed him the cut in price could not be tolerated and further to direct a letter to the retailer calling his attention to the violation of Sealy, Inc.'s retail advertising policy and to obtain the retailer's immediate written assurance that the retailer would not repeat such price cutting on Sealy's nationally advertised resale items. Pursuant to these instructions, the Denver licensee-member wrote the retailer and informed him that the ad showing a price below the agreed upon and set retail price was a direct violation of Sealy's advertising policy, and solicited the retailer's immediate assurance that he would cooperate on future ads to avoid a recurrence. The Denver licensee-member also informed the retailer that all Sealy resale nationally advertised products could not "be advertised at discount, tie-in with a giveaway, trade-in allowance, or a group price," and that the ad had been called to the Denver licensee-member's attention by the Chicago office of Sealy, Inc. Denver forwarded a copy of this letter to Mr. Bergmann at Sealy, Inc. as per Bergmann's request. Thereafter Berg-

mann for Sealy, Inc. thanked the Denver licensee-member for his complete cooperation, referring to Denver's letter advising his retailer "of the complaint of the National Office," and stated that this letter was the proper technique [fol. 266] to follow in impressing Sealy dealers that they must comply with Sealy advertising and merchandising policies (GX 883-885; Tr. 1951-1954; Doc. 3-4220 to 3-4222).

258. In August 1956, E. H. Bergmann for Sealy, Inc. sent the Rochester licensee-member a photocopy of a vigilante service report showing that the Vigilante Service had purchased a Sealy Posturepedic mattress from a discount house in Rochester, New York, at a price below the established retail price for that mattress and included the discount house's invoice which showed the identity of the discount house, the purchases made, the price and the shipping instructions. Bergmann informed the Rochester licensee-member that "As you know we have a vigilante service which each year buys one mattress at retail for the purpose of learning how prices are maintained . . ." and instructed Rochester to inform Sealy, Inc. of the steps Rochester had taken to correct the erroneous selling of Sealy merchandise to a discount house. Rochester replied that he had notified the discount house that Rochester would discontinue selling Sealy products to the discount house in the future and had retained the services of a shopping service to canvass Rochester's accounts and ascertain if any of them were discount houses. Rochester further promised that in the future he would not sell Sealy products to any account which was in the discount house [fol. 267] class (GX 886-888; Tr. 1954-1958; Doc. 3-4223 to 3-4225).

259. In September 1956, Sealy, Inc. received from its clipping service a tear sheet of a full page advertisement by a retailer of the Rochester licensee-member which showed Sealy products below the agreed upon and set retail price. Mr. Bergmann of Sealy, Inc. thereupon wrote the Rochester licensee-member about the ad and informed Rochester that the ad was completely out of order because of the price stated therein and the name used thereon. Rochester replied that he would not offer this account any promotions in the future and would warn the account about

the ad informing him in very definite terms that Rochester would not permit anything like this in the future (GX 889-890; Tr. 1958-1961; Doc. 3-4215 to 3-4217).

260. In October 1956, the Detroit licensee-member sent Mr. Bergmann at Sealy, Inc. an ad run by a retailer in New York which violated Sealy, Inc.'s retail advertising policies. Bergmann replied that he would write the Brooklyn licensee-member admonishing him for allowing an ad to be run which violated Sealy, Inc.'s retail advertising policies. Bergmann then wrote to Brooklyn, as he had promised, about the offensive ad, pointing out the violations contained therein and instructed Brooklyn to tell the retailer that Sealy, Inc.'s rules "were not to be toyed [fol. 268] with" and to advise Bergmann accordingly. Brooklyn, as instructed, contacted the retailer about the ad and the retailer promised not to violate Sealy, Inc.'s retail advertising regulations in any future ads. Brooklyn so informed Bergmann of the retailer's promise (GX 893-895; Tr. 1966-1970; Doc. 3-4183 to 3-4185).

261. In November 1956, a retailer of the Chicago stockholder-licensee complained to Sealy, Inc. about an ad which showed a Sealy product at a price below that established for that product, and pointed out that he could buy other mattresses for less than he paid for Sealy products but that his store was willing to resell Sealy on a shorter margin because of Sealy's efforts to nationally advertise and pre-sell Posturepedic products, but that for making this shorter margin concession, he expected inexorable price protection. The retailer further asked Sealy, Inc. what action it intended to take. The Chicago licensee-member replied to the retailer that Sealy's policy was to do everything within its persuasive and legal power to maintain their agreed upon and set advertised price on Sealy products and that a series of steps had been taken to make the company involved "comply with [Sealy's] policy and advertising requirements." Chicago then sent a copy of this letter to Sealy, Inc. (GX 896-897; Tr. 1971-1974; Doc. 3-4218, 3-4219).

262. In November 1956, E. H. Bergmann for Sealy, Inc. wrote the Baltimore licensee-member, complaining about a [fol. 269] full page ad run by a Baltimore retailer which

violated Sealy retail advertising policies, and condemned Baltimore as a member of the board of directors for permitting such an ad to be run. (GX 898; Tr. 1974-1976; Doc. 3-4167, 3-4168).

263. E. H. Bergmann for Sealy, Inc. in November 1956 wrote the Fort Worth stockholder-licensee about a circular, one of the Fort Worth stockholder-licensee's retailers in Texas had distributed showing Sealy products below the agreed upon and set retail price. Fort Worth replied that, immediately upon receipt of Bergmann's letter, he had called the retailer who had withdrawn the offensive prices and agreed not to repeat such a circular. Fort Worth further pointed out to Mr. Bergmann that not only did the State of Texas not have fair trade laws, but that they had anti-fair trade laws and therefore Fort Worth could not afford to write a retailer and be too positive in protesting cut prices; however, most of the Fort Worth's dealers maintained the prices and cooperated with Fort Worth even though he did not have any weapons in Texas with which to fight (GX 899; Tr. 1977-1978; Doc. 3-4196).

264. In December 1956, the Chester licensee-member telephoned the Reading licensee-member about an ad run by a customer of Reading which showed a Sealy product at a price below the agreed upon and set minimum retail price for Sealy products. The next day Reading wrote E. H. Bergmann at Sealy, Inc., with a copy to the Chester [fol. 270] licensee-maker, and stated there was no question about the ad being a violation of Sealy, Inc.'s retail advertising and merchandising policy and that the retailer had run the ad against Reading's policy and without his knowledge. Reading further stated that he had an appointment with the retailer and the situation would be corrected. Subsequently, Chester wrote Reading, with a copy to Mr. Bergmann at Sealy, Inc., further informing Reading of the violations committed by advertising a Sealy product below the agreed upon and set minimum retail price. Chester also pointed out that "*we must always present to the public the thought that Sealy is a National Brand, not a brand manufactured by a number of different manufacturers but an entity, even as the Simmons Co. is one,*" (emphasis supplied) and requested Reading to send

Chester a copy of Reading's letter to the retailer indicating "that they may not under any conditions advertise Sealy in Phoenixville, otherwise the privilege of allowing you [Reading] to ship . . . [into Chester's territory] will be withdrawn immediately insofar as the Sealy name is concerned," and admonishing them for violating Sealy, Inc.'s authorized retail advertising policies. (GX 901; Tr. 1980-1983; Doc. 3-3835, 3-3835A).

265. It was Sealy, Inc.'s admitted policy to urge the stockholder-licensees to in turn urge their dealers to maintain the retail prices agreed upon and set by the stock [fol. 271] holder-licensee representatives. As Mr. E. H. Bergmann, president of Sealy, Inc. from 1948 to 1960, put it, "We were always concerned with prices" (Tr. 3268-3269, 3271).

266. The purpose of the Sealy policy was to advertise Sealy products and "do everything we [Sealy, Inc.] possibly could to persuade the people to maintain those prices" (Tr. 3295).

267. In 1958, a retailer, Mr. G. N. Burkhart, Jr., in Brookston, Indiana, was informed by an official of the Chicago stockholder-licensee of Sealy, Inc. that Chicago was refusing to sell him any further Sealy products because Mr. Burkhart had not maintained the fixed retail prices for Sealy products (GX 1161; Tr. 3381-3395).

268. In late 1956 or early 1957, a retailer, Mrs. Norman Bennett of the U. S. Merchandise Mart, Inc. in Washington, D. C., was informed by an official of the Baltimore licensee-member that "Sealy would no longer be able to sell us [the retailer] merchandise" (Tr. 3496), since the retailer was not selling the Sealy products at the fixed retail price. Subsequently, when Mrs. Bennett forwarded orders for Sealy merchandise to Baltimore, they were not accepted (Tr. 3498).

269. From 1962 until the present day, a consumer in the Washington, D. C. area, after diligent search, could not purchase a Sealy product below the retail price fixed by the stockholder-licensee representative of Sealy, Inc. (Tr. 3462-3477).

[fol. 272] 270. Sealy, Inc., through its various officers, regularly policed and enforced the retail prices on Sealy

products as agreed upon and set by the stockholder-licensee representatives acting as the Board of Directors or Executive Committee of Sealy, Inc. This policing and enforcement was carried out through (1) subscribing to clipping services, (2) the advertising rebate program of Sealy, Inc., whereby the stockholder-licensees would send copies of their ads and their retailers' ads to Sealy, Inc. for credit on this program, and (3) the reporting by the stockholder-licensees and their retailers to Sealy, Inc. when they noticed infractions of Sealy, Inc.'s retail policies and regulations. When violations of Sealy, Inc.'s retail regulations and policies were found, Sealy, Inc. by its officers would so inform the stockholder-licensees and instruct them to so inform their retailers or Sealy, Inc. by its officers would write directly to the retailers involved and inform them of the violations. The stockholder-licensees also regularly policed and enforced the retail prices set by the stockholder-licensee [fol. 273] representatives acting as the Board of Directors or Executive Committee of Sealy, Inc. in the above described manner.

VIII. Use of Fair Trade to Enforce the Retail Prices Agreed Upon and Set by the Stockholder-Licensee Representatives of Sealy, Inc.

271. In May 1951, J. R. Lawrence for Sealy, Inc. wrote the Des Moines stockholder-licensee informing him that under the federal Miller-Tydings law, Sealy, Inc. could not establish resale prices for the entire group as they are not manufacturers, but they could direct their licensee-members to establish a uniform resale price (GX 902; Tr. 1984-1985; Doc. 3-4415.)

272. In June 1951, the Detroit licensee-member telephonically solicited from J. R. Lawrence at Sealy, Inc., ideas for a suggested letter that the Detroit licensee-member could send to its retailers. J. R. Lawrence thereupon sent the Detroit licensee-member a suggested letter and stated it was essential to give the retailers a list of the "fair traded" articles and the prices set thereon as agreed upon and set by the stockholder-licensee representatives which list J. R. Lawrence supplied (GX 903; Tr. 1986-1989; Doc. 3-4416, 3-4416A.)

273. The Baltimore stockholder-licensee issued a bulletin to all of its Sealy dealers on the subject of "Discount Houses" informing them that: (a) Sealy would not tolerate price cutting on "their re-sale numbers"; (b) Sealy products [fol. 274] would not be sold to discount houses; (c) discount houses had been shopped and the Baltimore stockholder-licensee had discovered that price cutters of Sealy merchandise were being supplied by so-called legitimate dealers; (d) the so-called legitimate dealers who were supplying these price cutters were breaking the law; (e) letters had been sent by Sealy attorneys to the parties involved threatening court action unless they ceased selling Sealy products to price cutters; (f) answers had been received from those who had been supplying the discount houses with Sealy products pledging to stop the practice in the future; (g) the Baltimore stockholder-licensee would take action, applicable to all fair trade areas, against any and all violators; and (h) the bulletin was to be a warning to all dealers found cutting the price on Sealy products or supplying anyone who cut the price on Sealy products (GX 904; Tr. 1989-1991; Doc. 3-4425).

274. In October 1953, the law firm of Haas, Holland and Blackshear, Atlanta, Georgia, by J. F. Haas, who was also the general counsel for Sealy, wrote a retailer in Baltimore, Maryland, threatening to refer to local counsel for prosecution the matter of the retailer's aiding another retailer who was selling Sealy products below the "fair trade" fixed price on Sealy products, if the retailer did not give immediate written assurance that he would immediately desist [fol. 275] from that practice. The Atlanta law firm sent a copy of the letter to (a) Mr. E. H. Bergmann, the president of Sealy, Inc., (b) Mr. J. R. Lawrence, the vice president of Sealy, Inc., and (c) the Baltimore stockholder-licensee. At the same time, J. F. Haas wrote to another retailer in Baltimore demanding that the retailer cease sales of Sealy products at less than the resale price and threatening to refer the matter to local counsel for prosecution unless Mr. Haas received within one week written assurance from the retailer that he would comply with the demand as stated in the letter. A copy of this letter was also sent to (a) the president of Sealy, Inc., Mr. E. H. Bergmann, (b) Mr. J. R.

Lawrence, the vice president of Sealy, Inc., and (c) the Baltimore stockholder-licensee (GX 905-906; Tr. 1992-1994; Doc. 3-4426, 3-4427).

27. In May 1954, Mr. E. H. Bergmann for Sealy, Inc. wrote directly to a retailer of the Pittsburgh stockholder-licensee, concerning an ad run by that retailer which featured Sealy products below the "fair trade" retail price agreed upon and set by the stockholder-licensee representatives. Mr. Bergmann advised the retailer that if he advertised for sale or sold any Sealy products below the agreed upon and set retail "fair trade" price, Sealy, Inc. was prepared to take such action as would be necessary to protect Sealy, Inc.'s products and rights, and instructed the retailer to acknowledge the notice and immediately advise [fol. 276] Sealy, Inc. that he would abide by the minimum resale prices fixed for Sealy products. He further informed the retailer that a copy of Bergmann's letter was being sent to Sealy, Inc.'s general counsel with instructions to take immediate steps against the retailer if he did not agree to comply with the terms of that letter. In June 1954, Bergmann again wrote the retailer and informed him that although the retailer had received Bergmann's May 1954 letter, Bergmann had not received any reply from the retailer indicating his willingness to comply with the request to maintain the minimum resale "fair trade" prices fixed on Sealy products, and therefore, Sealy, Inc. had referred the matter to their general counsel for finalizing with instructions to immediately appoint local counsel to institute legal proceedings against the retailer. Mr. J. F. Haas, general counsel for Sealy, Inc., thereupon wrote the retailer informing him that Sealy, Inc. had referred the case to Mr. Haas as general counsel for Sealy, Inc. and stated that he understood that, at a conference between the retailer and Mr. Bergmann, an agreement had been reached that the retailer would immediately write Mr. Bergmann assuring him that the retailer would immediately cease selling Sealy products below the fixed retail "fair trade" price, and that such a letter had not been received. Haas further stated that unless such a letter was immediately sent to Mr. Bergmann with a copy to Mr. Haas, he would [fol. 277] refer the matter to local counsel with instructions to file immediate suit against the retailer. In July 1954,

Mr. J. F. Haas wrote an attorney in Youngstown, Ohio, that he, Haas, had referred the matter to local counsel in Ohio, and that the only remedy was for the retailer to provide Mr. Bergmann with the letter which he had promised in Chicago. In August 1954, Bergmann for Sealy, Inc. wrote the Pittsburgh stockholder-licensee that the controversy with the retailer had been successfully concluded, and a letter had been received from the retailer which stated that in the future the retailer would not sell Sealy products below the retail "fair trade" prices agreed upon and set by the stockholder-licensees. Bergmann further stated that "it has taken considerable pressure on the part of the national office, General Counsel, and finally resorting to the appointment of local counsel . . . to institute proceedings against this firm [the retailer] for violations of the Ohio Fair Trade law" (GX 907, 909-912; Tr. 1994-1996, 2000-2007; Doc. 3-4322, 3-4411 to 3-4413, 3-4435, 3-4436).

276. In June 1954, the Cleveland stockholder-licensee wrote its retailers that all Sealy resale pre-ticketed mattresses had been fair traded in the State of Ohio and all of Cleveland's Sealy retailers were bound by the fair trade law. He further informed the retailers that he had engaged a shopping service to investigate and report to him those dealers who were not abiding by the fair trade law, and [fol. 278] such dealers would receive a warning; if the violations continued thereafter, he would take steps as provided in the fair trade law to put an end to those practices (GX 908; Tr. 1999-2000; Doc. 3-4338).

277. In August 1954, a retailer of the Kansas City licensee-member in St. Joseph, Missouri, wrote to E. H. Bergmann at Sealy, Inc. complaining that another Sealy dealer, located about sixty miles from St. Joseph, was selling Sealy products below the fixed retail "fair trade" prices for those products and requested Sealy, Inc. to urge "the Kansas City [licensee-member] officials to take immediate steps to correct this intolerable situation." The retailer further informed Bergmann that he had taken up the matter with the officials of the Kansas City licensee-member and had been assured that the offending dealer would receive no more Sealy products. Mr. J. R. Lawrence for Sealy, Inc. replied, with a copy to the Kansas City licensee-member, that while Sealy, Inc. did not knowingly sell to discount

operations, the task of keeping Sealy merchandise out of their hands was a tremendous one, and any program to be successful against such operations required an effective fair trade program for which *Sealy, Inc. on a national basis* and the Kansas City licensee-member on a local basis were laboring, and they were doing all possible to frustrate the operations of the discounters. In September 1954, the Kansas City licensee-member wrote Mr. Bergmann at [fol. 279] Sealy, Inc. that he had visited the discount operator in Missouri and had informed him that it was absolutely essential that not *one* item of Sealy merchandise be sold below the fixed retail "fair trade" price which had been nationally advertised and, since the discounter had sold below that price, Kansas City would discontinue selling Sealy products to him. Subsequently, Bergmann replied to the Kansas City licensee-member that Kansas City had taken the correct steps to enforce the prices fixed by the Sealy, Inc. stockholder-licensee representatives and that he should not hesitate to pass the information to other dealers and further "*Vigilance must be a rule in the support of our Fair Trade prices and trade names*" (emphasis supplied) (GX 913-916; Tr. 2008-2013, 2015-2019; Doc. 3-4319 to 3-4321, 3-4437 to 3-4439).

278. In February 1955, J. R. Lawrence for Sealy, Inc. wrote a retailer of the Cleveland stockholder-licensee concerning an ad run by the retailer showing Sealy, Inc.'s fair traded merchandise below the fixed "fair trade" price for that product, and stated that Sealy, Inc. was taking all the steps it could to protect the "fair trade" price of its products and solicited the retailer's cooperation and written assurance that he would not sell Sealy products below the retail "fair trade" prices fixed for those products (GX 917; Tr. 2020-2021; Doc. 3-4433).

279. In March 1955, E. H. Bergmann for Sealy, Inc. wrote the Cleveland licensee-member about the decision by [fol. 280] the stockholder-licensee representatives on the Executive Committee to set up a fair trade program which would be backed up by the national office in trade paper advertisements and requested the Cleveland licensee-member to send him full data on Cleveland's own fair trade program. He further stated that "The more complete this data can be, . . . the better it will serve the national

office purpose in formulating a national program to be presented to all of *our people*" (emphasis supplies). (GX 918; Tr. 2022-2023; Doc. 3-4418.)

280. Beginning before or during March 1954, the Cleveland stockholder-licensee employed Pinkerton's National Detective Agency for the purpose of shopping various retailers of the Cleveland stockholder-licensee to determine if they were maintaining the retail "fair trade" prices on Sealy products as agreed upon and set by the stockholder-licensee representatives of Sealy, Inc. (GX 919-930; Tr. 2047; Doc. 3-4339 to 3-4402.)

281. Sealy, Inc. with the stockholder-licensees of Sealy, Inc. regularly used the fair trade laws to enforce the retail prices on Sealy products as agreed upon and set by the stockholder-licensee representatives acting as the Board of [fol. 281] Directors or Executive Committee of Sealy, Inc., through letters written by Sealy, Inc., through its various officers, to the retailers and through letters written by the stockholder-licensees to their retailers (1) insisting that the retailers discontinue violating the retail prices on Sealy products as agreed upon and set by the stockholder-licensee representatives acting as the Board of Directors or Executive Committee of Sealy, Inc., (2) insisting that written assurance of compliance with such prices be forthcoming from the retailer, (3) informing the retailer that if such written assurance were not forthcoming, Sealy, Inc. or the stockholder-licensee would (a) discontinue supplying the retailer with Sealy products, (b) inform other retailers to cease supplying the retailer with Sealy products, and (c) take legal action against the retailer under state fair trade laws.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the defendant and the subject matter of this action.

2. Defendant is engaged in interstate commerce.

3. Plaintiff has not proved by a preponderance of evidence [fol. 282] that defendant, Sealy, Incorporated, has engaged in a combination and conspiracy with its manufacturing licensees to allocate territory among competitors in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

4. The assignment of exclusive territories by defendant, Sealy, to its manufacturing licensees does not violate the antitrust laws.

5. The defendant and its co-conspirators are and have been engaged in a continuing agreement, understanding, combination, and conspiracy in restraint of interstate commerce in mattresses and foundations in violation of Section 1 of the Sherman Act [15 U.S.C. § 1] by agreeing to set minimum retail prices on Sealy products and to induce retailers to adhere to such retail prices.

R. B. Austin, Judge, U. S. District Court.

Date: October 6, 1964.

[fol. 283] IN THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 60 C 844

UNITED STATES OF AMERICA, Plaintiff,

vs.

SEALY, INC., Defendant.

FINAL JUDGMENT—December 30, 1964

Plaintiff, United States of America, filed its complaint on two separate claims of violation of Section 1 of the Sherman Act, 15 U.S.C. §1, described in paragraphs 16(a) and 16(b) of said complaint. The defendant, Sealy, Incorporated, appeared and filed its answer. At the close of the government's evidence in support of the claims, the defendant moved to dismiss said complaint pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The motion was denied, but the court indicated that there would be no finding that the allegations of paragraph 16(a), and proof submitted thereon, proved a violation of the antitrust laws. [fol. 284] Defendant then presented its evidence relating to the price-fixing charge in paragraph 16(b) of the complaint and the government presented its rebuttal. At the close of all the evidence, the defendant renewed its motion to dismiss the claim of paragraph 16(a) of the complaint.

The court has considered the pleadings, evidence, briefs and arguments, and being fully informed, entered findings of fact and conclusions of law on October 6, 1964.

NOW, THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I.

This court has jurisdiction of the subject matter hereof and the parties hereto.

II

Based upon the court's findings of fact 15 through 19 and its conclusions of law 3 and 4, the defendant's renewed motion to dismiss the claim in paragraph 16(a) of the com-

plaint is granted and judgment is hereby entered dismissing the claim for relief contained in paragraph 16(a) of said complaint.

[fol. 285]

III

Based upon the court's findings of fact 120 through 281 and its conclusion of law 5, the defendant and its co-conspirators, who are its stockholder licensees, have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act by agreeing to set minimum retail prices in Sealy products and to induce retailers to adhere to such retail prices.

IV

As used in this Final Judgment:

(A) "Mattress" means an item of bedding composed of an outer covering, or tick, enclosing innersprings or a filler of latex, synthetic foam, felt or other materials, or both, designed to be used as a pad for a bed and usually rests upon bedsprings or other foundation or support;

(B) "Foundation" means an item of bedding, apart from the bedstead, designed to support the mattress and often to provide additional cushioning, commonly but not exclusively composed of an upholstered frame enclosing springs;

[fol. 286] (C) "Combination" means a mattress and foundation manufactured as a set to match each other and to be sold together;

(D) "Sleeper" means a sofa bed, studio couch, mattress, foundation, combination or Hollywood bed ensemble;

(E) "Sealy products" means bedding manufactured by Sealy licensees under Sealy's patents and secret methods, processes or specifications and sold under the Sealy brand-name and Sealy registered trademark;

(F) "Retail store" means a person engaged in the business of selling mattresses, foundation, combinations or sleepers to consumers;

(G) "Sealy licensee" means a person who is licensed by defendant to manufacture and sell Sealy products to dealers.

(H) "Dealer" means any person, other than defendant or a Sealy licensee, purchasing bedding for resale to the ultimate consumer.

V

The provisions of this Final Judgment shall apply to the defendant, its successors, subsidiaries, assigns, officers, director, agents and its employees, and to all other persons [fol. 287] in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise.

VI

(A) The defendant is enjoined and restrained from continuing, reviving or renewing the aforesaid combination and conspiracy.

(B) The defendant is enjoined from entering into, adhering to or maintaining any contract, agreement, arrangement, understanding, plan or program to:

(1) fix, establish or maintain the price or other terms or conditions for the sale at retail of any mattresses, foundations, combinations or sleepers;

(2) induce any dealer to fix, establish, or maintain any minimum retail price for any mattresses, foundations, combinations or sleepers;

Provided, however, that nothing herein contained shall be construed to prohibit the defendant from disseminating and using suggested retail prices for the purpose of national advertising of Sealy products.

VII

[fol. 288] (A) For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, made to its principal office, be permitted:

(1) Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters.

(B) Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust [fol. 289] Division, the defendant shall submit such reports in writing to the plaintiff with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of said Final Judgment.

(C) No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the such department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII

Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this court at any time for such further orders and directions as may be necessary or appropriate for the modification, termination, construction or carrying out of this Final Judgment and for the enforcement of compliance therewith and the punishment of the violation of any of the provisions contained therein.

[fol. 290]

X

The plaintiff shall recover the costs of this action.

Enter: R. B. Austin, United States District Judge.

Chicago, Illinois, December 30, 1964.

[fol. 291]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

Civil Action No. 60 C 844

UNITED STATES OF AMERICA, Plaintiff,

v.

SEALY, INC., Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED
STATES—Filed February 26, 1965

I. Notice is hereby given that the plaintiff, the United States of America, hereby appeals to the Supreme Court of the United States from the final decree entered in this action December 30, 1964 in so far as it dismissed the claim in paragraph 16(a) of the complaint in this action and failed to enjoin the defendant from limiting the territories within which defendant's licensees may sell Sealy mattresses and bedding products.

This appeal is taken pursuant to 15 U.S.C. 29.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include therein the entire record before the district court, including all papers filed with the Clerk of the court in this proceeding, the transcript of the trial proceedings, all exhibits submitted by the parties and this notice of appeal.

III. The questions presented are (1) whether Sealy, Inc., violated Section 1 of the Sherman Act (15 U.S.C. 1) by establishing and maintaining agreements with its licensee-shareholders whereby each licensee would sell Sealy mat-[fol. 292] tresses and bedding products only within an exclusive marketing territory allocated to it, and would refrain from selling Sealy products outside such territory, and (2) whether the court should, in any event, have enjoined the maintenance of such exclusive territories in view

of its finding that Sealy, Inc., and its licensees had violated Section 1 of the Sherman Act by engaging in resale price fixing.

/s/ John E. Sarbaugh. /s/ Bertram M. Long, Attorneys, Department of Justice, Room 2634, United States Courthouse, Chicago, Illinois 60604. 828-7538.

[fol. 293] Affidavit of Proof of Service omitted in printing.

[fol. 294] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 60 C 844

At Chicago, Illinois

UNITED STATES OF AMERICA, Plaintiff,

v.

SEALY, INC., Defendant.

ORDER EXTENDING TIME TO DOCKET APPEAL—April 22, 1965

Upon motion of the United States, and consent of the appellee, it is hereby ordered that the time for the appellant to docket this case on appeal in the Supreme Court of the United States shall be extended for a period of 30 days, i.e. until May 26, 1965.

Julius J. Hoffman, United States District Judge.

[fol. 295] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1965

No. 238

UNITED STATES, Appellant,

— v. —

SEALY, INC.

Appeal from the United States District Court for the
Northern District of Illinois.

ORDER NOTING PROBABLE JURISDICTION—October 11, 1965

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted.